46 Box 9 - [JGR/*Chadha* re: District of Columbia] (10) - Roberts, John G.: Files SERIES I: Subject File

THE WHITE HOUSE

WASHINGTON

April 6, 1984

MEMORANDUM FOR J. STEVEN RHODES
ASSISTANT TO THE VICE PRESIDENT
FOR DOMESTIC POLICY

FROM: RICHARD A. HAUSER /S/
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Home Rule Issues

In 1983 the Supreme Court issued its decision in the landmark case of INS v. Chadha, ruling that so-called "legislative vetoes" were unconstitutional. A "legislative veto" is a device whereby Congress purports to retain authority to review and reject actions by agencies or other entities to which it has delegated law-making authority. The D.C. Self-Government and Governmental Reorganization Act (popularly known as the Home Rule Act) contains two types of legislative vetoes. There is a two-house veto for most matters, purporting to permit Congress to block most D.C. Council actions by majority vote of both Houses. There is a separate one-house veto for criminal laws, purporting to authorize Congress to block D.C. Council actions in the criminal area on the basis of a majority vote in only one House. (Since it is obviously easier to obtain a majority in one House rather than both, it is clear that Congress has always retained more control over D.C. Council actions in the criminal area.) The presence of the unconstitutional legislative vetoes in the Home Rule Act called into question the legal authority of the D.C. Council to take any action, and precipitated the current crisis.

There are basically two ways to cure legislative veto problems. One is to replace the illegal veto with a provision requiring Congress to pass a law to block the action in question, the other is to replace the veto with a provision requiring that the action in question will not take effect unless Congress passes a law approving it. In light of the obvious difficulty of passing a law through Congress, which of these approaches is taken makes all the difference.

After the problems with the Home Rule Act became evident, the D.C. Government proposed the first cure -- requiring Congress to pass a law to block D.C. Council actions. In practice this would have meant little Congressional oversight. The bill passed the House before the Administration could make its views known; our objections stopped Senate passage.

As an alternative the Administration proposed following the District's approach for most D.C. Council actions. Only in the criminal area would the presumption be reversed and the second approach to curing legislative veto problems be followed. In the criminal area, under the Administration's proposal, Congress would have to pass a law approving any D.C. Council action before it could become effective. In all other areas, Congress would have to pass a law to block the action, as proposed by the District.

District officials objected that we were turning back the clock on Home Rule. We responded that we were simply carrying forward the distinction in the original Home Rule Act giving Congress greater control over criminal laws. We also stressed the Federal interest in the criminal area: Federal prosecutors bring the cases, judges appointed by the President hear them, and U.S. Marshals are responsible for the convicts. These arguments were set forth in a November 15, 1983 letter from the Department of Justice (Tab A).

The District next proposed the so-called "short form" D.C. Chadha bill, which would ratify all past D.C. Council acts and provide that any unconstitutional provision in the Home Rule Act was severable. The Administration refused to accept this. The effect of the "short form" bill would be the same as the original District proposal: the unconstitutional legislative vetoes would be severed, requiring Congress to pass a law if it wanted to block D.C. Council proposals. The Department of Justice announced the Administration's opposition to this approach in a letter dated March 12, 1984 (Tab B).

Negotiations are proceeding apace between Justice Department officials and District government representatives. There is also litigation on the matter, brought by criminal defendants who claimed that they were improperly prosecuted because of the legislative veto problems. Trial courts in the District recently rejected these claims, ruling that the Chadha decision did not apply to the Home Rule Act. If these decisions are correct, the whole controversy is moot, but it is highly questionable whether the rationale of the decisions -- as opposed to their result -- will survive appeal.

It must be emphasized that this question has been handled by the Department of Justice for the Administration. The basis for our position originated with that Department and directly concerns the law enforcement responsibilities of that Department. Correspondence and negotiations on the issue

have been handled exclusively by Justice. There is little to be gained by introducing the White House directly into the dispute.

On January 17, 1984, in response to an approach to Mr. Deaver by Mayor Barry, a meeting chaired by Lee Verstandig took place to consider the Mayor's request that Mr. Deaver become involved in the issue. The meeting was attended by representatives of Intergovernmental Affairs, OMB, Justice, and the Counsel's Office. It was unanimously decided that the matter should be handled by Justice, and that the White House should not become directly involved.

RAH:JGR:aea 4/6/84
cc: FFFielding/RAHauser/JGRoberts/Subj/Chron

THE WHITE HOUSE

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As an alternative the Administration proposed following the District's approach for most D.C. Council actions. Only in the criminal area would the presumption be reversed and the second approach to curing legislative veto problems be followed. In the criminal area, under the Administration's proposal, Congress would have to pass a law approving any D.C. Council action before it could become effective. In all other areas, Congress would have to pass a law to block the action, as proposed by the District.

District officials objected that we were turning back the clock on Home Rule. We responded that we were simply carrying forward the distinction in the original Home Rule Act giving Congress greater control over criminal laws. We also stressed the Federal interest in the criminal area: Federal prosecutors bring the cases, judges appointed by the President hear them, and U.S. Marshals are responsible for the convicts. These arguments were set forth in a November 15, 1983 letter from the Department of Justice (Tab A).

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RAH:JGR:aea 4/6/84
cc: FFFielding/RAHauser/JGRoberts/Subj/Chron

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Mike Horowitz	Take necessary action ☐
	Connie Horner	Approval or signature ☐
	John Roberts ✓	Comment ☐
	Gordon Wheeler	Prepare reply ☐
		Discuss with me ☐
		For your information ☐
		See remarks below ☐
FROM	Jan Fox Jan Fox	DATE 11/16/83

REMARKS

For your information, attached is a final copy of the Justice letter on H.R. 3922, the D.C. Chadha bill. Changes from the earlier version were made on pp 3-4.

The letter I sent to you yesterday from the District was from the D.C. Council. The Mayor also intends to send us a letter on this issue, which I will send to you when I receive it.

cc: John Cooney
Anna Dixon

OMB FORM 4
Rev Aug 70

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

15 NOV 1983

A

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to your request, this letter presents the views of the Department of Justice on H.R. 3932, a bill "to amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes," as passed by the House of Representatives on October 4, 1983. We oppose the enactment of this legislation unless it is amended consistent with the discussion set forth below.

H.R. 3932 would amend the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973), as amended, ("Act"). The legislation is in response to the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983) which struck down as unconstitutional so-called "legislative veto" devices. 1/ The Act contains several such devices 2/ purporting to authorize Con-

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1/ The Supreme Court has also affirmed the invalidity of two other legislative veto provisions. See Process Gas Consumers Group v. Consumers Energy Council or America, 103 S. Ct. 3556 (1983), affirming Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

2/ The Act contains four provisions which may be characterized as legislative vetoes. These are:

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

gress to disapprove actions of the District of Columbia Government without complying with the constitutional requirements of legislation.

The Administration generally supports the approach of H.R. 3932, which would correct the constitutionally invalid portions of the Act by requiring Congressional action disapproving acts passed by the D.C. City Council to take the form of legislation passed by both Houses and presented to the President for approval or disapproval. In one narrow area, however, the Administration believes that it would be more consistent with Congress' prior treatment under the Act to require affirmative approval of acts passed by the D.C. City Council rather than opportunity for disapproval. We recommend that H.R. 3932 be amended to provide that City Council laws amending Titles 22, 23 and 24 of the District of Columbia Code -- which relate to criminal law, criminal procedure and prisoners-- only take effect upon passage by Congress of a joint resolution of approval. This approach will cure the constitutional infirmities pointed out by the Chadha decision, while retaining the special treatment accorded Titles 22, 23, and 24 under the existing Act.

Under the Constitution, Congress has the exclusive power to legislate for the District of Columbia. Art. I, §8, cl. 17. Pursuant to this authority Congress has enacted Titles 22, 23 and 24 of the D.C. Code. The Department of Justice, through the United States Attorney for the District of Columbia, has been vested with the prosecutive authority in the United States District Court and the District of Columbia Superior Court. D.C. Code §23-101. Indictments are sought, and prosecutions pursued in the name of the United States of America. Similarly, this Department, through the U.S. Marshal for the District of Columbia conducts the service of criminal process, provides courtroom security, transports prisoners, and returns to the District of Columbia defendants arrested in other jurisdictions and wanted for prosecution in the District of Columbia. The U.S. Marshals Service utilizes its authority under law to serve Superior Court felony subpoenas anywhere in the United States. D.C. Code §11-942(b).

Footnote 2 continued from page 1

(3) Section 602(c)(2) provides that any Act affecting Title 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

Finally, all persons convicted in the District of Columbia are committed to the custody of the Attorney General, who, through the Department's Bureau of Prisons, designates the place of confinement. D.C. Code §24-425. 3/

The Superior Court of the District of Columbia, where jurisdiction for local offenses rests, is a federal court created pursuant to Article I of the Constitution. Palmore v. United States, 411 U.S. 389, 397 (1973). The judges of the Superior Court and the Court of Appeals are appointed by the President. D.C. Code §§11-101, 11-102, 11-301, and 11-1501(a). A single jury system for grand and petit juries serves both the Superior Court and Federal District Court. A grand jury of one court may return indictments to the other. D.C. Code §§11-1902, 11-1903(a). The federal government is, accordingly, deeply interested in the prosecution of crimes under the D.C. Code, their determination before the courts, and the handling of prisoners convicted under the Code.

The federal government owns approximately 41% of all land in the District. Over 200 buildings are owned or leased by the federal government. Over 445,000 federal employees work in the Washington Metropolitan area. As a result, the District draws both the nation's citizens and those of other countries for purposes ranging from conducting business with the federal government to touring the capital. Moreover, the existence of a sizable diplomatic community underscores the federal interest in the enactment, enforcement and interpretation of the criminal laws governing the District.4/

3/ By agreement with the Government of the District of Columbia most District of Columbia prisoners are sent to the Lorton Reformatory.

4/ Our concerns in these areas do not take place in a vacuum. Presently before the D.C. Council are three bills, Bill 5-16, the Parole Act of 1983, Bill 5-244, the Prison Overcrowding Emergency Powers Act of 1983, and Bill 5-245, the District of Columbia Sentencing Improvements Act of 1983, which raise substantial concern. Bill 5-16 would reduce the minimum period of detention to 10 years and would be applicable to individuals incarcerated for such crimes as rape, murder and armed offenses. Bill 5-244 would permit, as a means of budget control, the release into the community of convicted individuals. Bill 5-245 would expand the time for granting a motion to reduce a sentence from 120 days to one year. While this Department has strongly opposed these proposals (and of course, the Council has yet to act upon them), we believe more importantly, that Congress, through the legislative process, should retain the opportunity to review the wisdom of such proposals.

Special treatment for Titles 22, 23 and 24 is consistent with the existing Act and its legislative history. Specifically, in only one area did Congress reserve to itself to veto by vote of only one House the acts of the City Council - Titles 22, 23 and 24 of the D.C. Code. Act §602(c)(2). See also H.R. Rep. No. 482, 93d Cong., 1st Sess. (1973). In fact the original bill, as passed by the House of Representatives, prohibited the soon to be established Council from legislating in the criminal law area. H.R. 9682, 93d Cong., 1st Sess., §602(a)(8) (1973). The Senate version contained no such prohibition. S. 1435, 93d Cong., 1st Sess. (1973). The conference version represented a compromise by inserting a one house veto. Pub. L. No. 93-198, §602(c)(2), 87 Stat. 774 (1973). 5/

The Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983), now requires this arrangement to be reworked. 6/ Our objection to H.R. 3932 is that the federal government is now asked to surrender permanently its authority in an area of its plenary responsibility. We believe that in light of the historic responsibility of the federal government for criminal law enforcement in the district, the interests of both the citizens of the District of Columbia and the Nation as a whole are better served by continuing the special treatment accorded Titles 22, 23 and 24 and maintaining the primary responsibility of the Congress and the President in this area. This responsibility can be preserved by requiring a joint resolution of approval for D.C. Council amendments to Titles 22, 23 and 24 of the District of Columbia Code. In this

(Footnote Continued from Page 3)

4/ Additionally, in 1981, the D.C. Council passed a Sexual Assault Reform Act. Among its provisions was one which lowered the age of consent for minors in statutory rape cases. Another provision would have reduced the maximum sentence for both forcible and statutory rape from life to 20 years imprisonment. The penalty for incest was reduced. The proposal also reduced the penalty for forcible rape to a 10 year maximum if the victim was physically or mentally incapable of consenting or resisting. The House of Representatives passed a resolution disapproving the proposal. H. Res. 208, 97th Cong., 1st Sess., 127 Cong. Rec. H6762 (1981).

5/ We also note that during the first two years subsequent to the date which elected members of the initial Council took office, the Council was prohibited from legislating in this area while a study of the District of Columbia Criminal Code was undertaken for the Congress. This was later extended to four years. See §602(a)(9) of the Act.

6/ See Statement of Edward C. Schmults, Deputy Attorney General, before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives (July 18, 1983).

connection, it should be noted that this proposal will give the District government more authority than it has under present law in every area except the criminal field.

It is important to be aware that the question at stake transcends the issues of the moment and that there is no inherent conflict between the District and federal government. The issues in H.R. 3932 result from the unique federal and district relationship embodied in present law. This Department values its representation of the citizens of the District of Columbia and shares their goal of ensuring that a fair, efficient, and effective criminal justice system be in place. In conclusion, we oppose enactment of H.R. 3932 unless it is amended consistent with the views expressed in this letter.7/

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

ROBERT A. McCONNELL
Assistant Attorney General

7/ We are sensitive to the need of the District of Columbia to have the ability to raise revenues through the municipal bond market. Section (1)(i) of H.R. 3932 is directed toward ratifying previous actions of the D.C. Council with respect to these bonds. We would suggest, however, that $(1)(i) be clarified so as not to imply that actions of the D.C. Council which never became effective, whether because they were subject to Congressional action or otherwise, are ratified.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 2053(

12 MAR 1984

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on the proposal to amend the District of Columbia Self-Government and Governmental Reorganization Act (the "Act") set forth in a letter to the Honorable Charles McC. Mathias, United States Senate, from the Honorable Marion Barry, Jr., Mayor, District of Columbia (November 17, 1983). For the reasons set forth below, the Department of Justice opposes enactment of this proposal.

The proposal submitted by the District of Columbia would provide as follows:

"Sec. 1. Any law which was passed by the Council of the District of Columbia prior to the date of the enactment of this Act is hereby deemed valid, in accordance with the provisions thereof.

Sec. 2. Part F of title VII of such Act is amended by adding at the end thereof the following new section:

Severability

Sec. 762. If any particular provisions of this Act, including any provisions of this Act with respect to adoption of resolutions by one or both Houses of Congress disapproving acts of the Council, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby."

As stated in the Mayor's letter of November 17, 1983, the proposal is directed toward enabling the District of Columbia to issue municipal bonds. As a result of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), which declared the so-called "legislative veto" device

unconstitutional, questions have been raised over the ability of the District of Columbia to obtain revenues through the bond market, since the Act contains several legislative vetoes. 1/ We take no position as to whether the proposal would in fact resolve those questions. Rather, our objections to the proposal evolve from other legal consequences which may ensue from its enactment.

Section 1 of the proposal, by affirming all previous actions of the D.C. Council, does not take into account those actions of the D.C. Council which never became effective, or which were invalidated after becoming effective, whether because they were subject to Congressional action, court challenge or otherwise. While we do not object to the general intent underlying section 1 -- to dispel any cloud Chadha may have cast over laws that previously took effect following passage by the D.C. Council -- we believe that this intent would be better served by a provision that affirmed only those laws which in fact came into effect and are currently valid. Section 1 does not account for laws which passed the D.C. Council but have been repealed, modified or amended, were temporary in nature or subject to a sunset provision and have lapsed, or have been judicially determined invalid.

. . . . . .

1/ The Act contains four provisions which may be characterized as legislative vetoes. These are:

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

(3) Section 602(c)(2) provides that any Act affecting Titles 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department."

Section 2 of the proposal, if enacted, could have an impact extending far beyond merely inserting a severability provision into the text of the Act. If a court were to rely on section 2 to hold that the legislative veto provisions of the Act are severable, 2/ the result will be to sustain, with one exception, 3/ the actions of the D.C. Council in all matters subsequent to the passage of this proposal without the need to secure an enactment of a law by the Congress. In practical terms, the intent of the proposal runs contrary to our position on H.R. 3932, another bill to amend the Act upon which we have previously reported. See Letter to Honorable William V. Roth, Jr., Chairman, Committee on Governmental Affairs, United States Senate, from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (November 15, 1983). In that report, we expressed general support for H.R. 3932, which would correct the constitutionally invalid portions of the Act by requiring D.C. Council actions to be subject to disapproval by enactment of a joint resolution.

In the narrow area of criminal law, criminal procedure and prisoners, however, we urged that actions of the D.C. Council should take effect only upon enactment of a joint resolution of approval by the Congress. Section 2, by declaring that a provision of the Act is severable in the event it is determined invalid, would allow the remaining provisions to stand alone. If, for example, the invalid congressional review provisions were found to be severable from the remaining provisions of the Act, D.C. Council actions would become law without any subsequent Congressional examination. For the reasons set forth in our letter of November 15, 1983, we do not believe this to be an appropriate post-Chadha compromise, particularly in the area of criminal law,

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2/ We note that the severability of a particular provision from a statute does not necessarily turn on the presence or absence within that statute of a severability clause. See United States v. Jackson, 390 U.S. 570, 585 n.27 (1968). While this letter is not intended to reflect on the severability of the legislative veto devices in the Act, we would expect a court to rest its ultimate inquiry into the question of severability on whether Congress would have enacted the remainder of the statute without the unconstitutional provision. See Consumer Energy Council of America v. FERC, 673 F.2d 425, 442 (D.C. Cir. 1982) aff'd mem., 103 S.Ct. 3556 (1983). We therefore would not expect the mere presence or absence of a severability clause passed subsequent to the Act to be determinative of the severability question.

3/ The Act precludes the D.C. Council from amending Title 11 of the D.C. Code (relating to organization and jurisdiction of the District of Columbia courts). See Section 602(a)(4) of the Act.

criminal procedure, and prisoners. Instead, we believe that the proper balance of lawmaking authority would be maintained if a joint resolution of approval were required in order for D.C. Council amendments to Titles 22, 23 and 24 of the D.C. Code to take effect.

In summary, we oppose the enactment of the recent proposal submitted by the District of Columbia. It does not take into account actions of the D.C. Council which did not become effective, are no longer effective, or have been held invalid. It also ignores the undesirable consequences that would likely result from simply inserting a severability clause into the text of the Act.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's position.

Sincerely,

(Signed) Robert A. McConnell

ROBERT A. McCONNELL
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

file

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

M E M O R A N D U M

April 18, 1984

TO: Richard A. Hauser
Deputy Counsel to the President
The White House

FROM: Michael W. Dolan
Deputy Assistant Attorney General
Office of Legislative Affairs

SUBJECT: D.C./Chadha Testimony

Here is a copy of the proposed testimony that we submitted to OMB this afternoon.

DRAFT

STATEMENT

OF

JOSEPH DIGENOVA
UNITED STATES ATTORNEY
DISTRICT OF COLUMBIA

BEFORE

THE

SUBCOMMITTEE ON GOVERNMENT EFFICIENCY
AND THE DISTRICT OF COLUMBIA
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ON

APRIL 25, 1984

DRAFT

Mr. Chairman, I am honored to appear before your subcommittee in response to your invitation for the views of the Department of Justice on S. 1858, a bill to amend the District of Columbia Self-Government and Governmental Reorganization Act, Pub.L. 93-198, 87 Stat. 774 (1973), as amended, popularly known as the "Home Rule Act."

S. 1858 is a thoughtful attempt to correct a constitutional problem in the Home Rule Act -- a problem that became even more apparent with the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, No. 80-1832 (June 23, 1983).

As you know, Chadha, a case involving the Immigration and Nationality Act, struck down the so-called legislative veto device as violative of the Presentment Clause of Article I, section 7, of the Constitution and the principle of separation of powers. We have identified at least 126 separate statutes and 207 individual sections that contain unconstitutional legislative veto mechanisms. The Home Rule Act contains four such provisions:

> (1) section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment";
>
> (2) section 602(c)(1) provides that with respect to acts of the District of Columbia Council effective immediately due to emergency circumstances and acts proposing amendments to Title IV of the Home Rule Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act";
>
> (3) section 602(c)(2) provides that any act of the D.C. Council affecting Title 22,

23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act"; and

(4) section 740(a) provides that either house may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

S. 1858 apparently agrees with our judgment that these provisions are constitutionally invalid, for it would amend the Act to require Congressional action disapproving D.C. Council enactments to take the form of legislation, passed by both houses and presented to the President for approval or disapproval.

S. 1858, and its counterpart, H.R. 3932, which passed the House on October 6 of last year, represent one of the first attempts by Congress to address by legislation Chadha's holding. Because the legislative veto mechanism is employed to balance conflicting Legislative and Executive Branch interests, there is no ready replacement. Rather, Congress and the Executive must examine each individual statute to determine how best to reallocate the varying interests that the individual legislative veto device in question sought to accommodate, consistent with Chadha's holding that legislation must be presented to the President for his signature. This is what must be done with the Home Rule Act.

Generally, we agree with the approach taken by S. 1858: by converting the legislative veto to, in effect, a joint resolution of disapproval, the Home Rule statute will be brought into compliance with the Constitution as required by Chadha.

It should be noted, however, that in the Home Rule Act, Congress did not permit the D.C. Council to amend title 11 of the D.C. Code, the court structure title, and gave special treatment to D.C. Council amendments to three titles of the D.C. Code. Amendments to these titles, titles 22, 23, and 24, were subject to a one house veto, as opposed to the two house, or concurrent resolution veto, that applied to the other parts of the D.C. Code. These three titles, the criminal justice titles of the D.C. Code, were treated differently in 1973, and should be treated differently today, because of the special federal interest in the criminal justice system of our nation's capital. While we heartily endorse the use of a joint resolution of disapproval mechanism for the bulk of the amendments to the D.C. Code, we believe, for the following reasons, that amendments to titles 22, 23, and 24 should continue to receive separate treatment.

In the District of Columbia, prosecutions are brought in the name of the United States of America. The Department of Justice, through the United States Attorney for the District of Columbia, is the District's chief prosecutor. Similarly, the Department of Justice through the United States Marshal for the District of Columbia is responsible for the service of process, courtroom security, the transportation of prisoners, and the return to the District of Columbia of defendants arrested in other jurisdictions and wanted for prosecution in the District. All persons convicted in the District of Columbia are committed to the custody of the Attorney General, who, through the Department's Bureau of Prisons, designates the place of confinement. A longstanding agreement

with the District of Columbia Department of Corrections places most male prisoners in the Lorton facility.

The court of general jurisdiction in the District of Columbia, the Superior Court of the District of Columbia, is a federal court, and the judges of the Superior Court and the District of Columbia Court of Appeals are appointed by the President with the advice and consent of the Senate. A single jury system for grand and petit juries serves both the Superior Court and the United States District Court for the District of Columbia, and a grand jury of one court may return indictments to the other.

That Congress has determined that District of Columbia criminal justice system should be controlled by the federal government is not surprising when one considers the extent of the federal interest in the District. Approximately 41% of all land in the District is owned by the federal government. More than 200 buildings are owned or leased by the federal government. Over 445,000 federal employees work in the Washington Metropolitan area. Countless Americans visit their capital city each year for purposes ranging from conducting business with the federal government to touring the capital. The presence of a substantial permanent diplomatic community and innumerable foreign visitors underscore the federal interest in the enactment, enforcement and interpretation of the criminal laws governing the District of Columbia.

We believe that D.C. Council amendments to the criminal justice titles of the D.C. Code should continue to receive the special scrutiny that their importance to the federal government requires. Last fall the Department suggested that the primary authority of

the Congress and the President in District of Columbia criminal justice matters could best be preserved by subjecting D.C. Council amendments to the criminal justice titles to a joint resolution of approval, and this continues to be our position. In informal discussions with representatives of the District Government we have explored other alternatives.

I should emphasize, however, that even under our resolution of approval proposal, the District Council would have far more independence from the Congress and the President than it has under current law. Thus, D.C. Council enactments to those provisions of the D.C. Code other than the criminal justice provisions, the bulk of the D.C. Code, that before Chadha would be subject to a concurrent resolution veto, would now be subject only to a joint resolution veto, which requires the approval of the President. It would, in other words, take a statute to overturn a Council amendment to the non-criminal justice provisions -- a Congressional authority that even the Council would not quarrel with and a substantial diminution of federal authority over the greatest part of the D.C. Code.

While we oppose the enactment of S. 1858, unless amended as suggested above, we will continue to work with representatives of the District of Columbia government to propose to Congress an amendment to the Home Rule Act that will satisfy all of our concerns.

THE DAILY WASHINGTON
Law Reporter
Established 1874

D.C. Chadha file

D.C. Superior Court

CONSTITUTIONAL LAW
LEGISLATIVE VETO

Unicameral veto provision of D.C. Home Rule Act does not violate U.S. Constitution because of plenary powers granted Congress for District of Columbia.

UNITED STATES v. McINTOSH, Sup.Ct., D.C. Crim. No. F-4892-83, March 27, 1984. *Opinion* per Robert A. Shuker, J. *Susan Holmes* for U.S. *Timothy Junkin* for McIntosh.

SHUKER, J.: While pending trial in this sexual assault case, defendant has moved to dismiss those counts of the indictment that charge him with rape and carnal knowledge, claiming that the statutory provision under which he is being prosecuted is invalid in light of the Supreme Court's recent decision in *INS* v. *Chadha*, 103 S.Ct. 2764 (1983).

I

The rape and carnal knowledge counts of the indictment are being prosecuted as violations of D.C. Code §22-2801. This section of the code was originally enacted on March 3, 1901. On July 21, 1981, the Mayor of the District of Columbia approved an act entitled the District of Columbia Sexual Assault Reform Act of 1981. This act, *inter alia*, renamed the offenses of rape and carnal knowledge and provided for the repeal of D.C. Code §22-2801. While the new act did not change the elements of rape or carnal knowledge, it did significantly reduce the penalties. Under D.C. Code §22-2801, the maximum penalty for either rape or carnal knowledge is life imprisonment; under the Sexual Assault Reform Act, the maximum penalty for either sexual assault in the first degree (rape) or an unlawful sexual act with a child (carnal knowledge) would be imprisonment for twenty years. Following the Mayor's approval of the Act on July 21, 1981, the Chairman of the Council of the District of Columbia transmitted the Sexual Assault Reform Act to the Speaker of the House of Representatives and the President of the Senate. As provided in §602(c)(2) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code §1-233(c)(2) (Home Rule Act), an act transmitted to Congress by the Chairman that pertains to Title 22 shall take effect at the end of a thirty-day period unless during that time either House of Congress adopts a resolution disapproving it.

On September 9, 1981, the House of Representatives adopted a resolution disapproving the Sexual Assault Reform Act.

On June 23, 1983, the Supreme Court, in *INS* v. *Chadha, id.*, held unconstitutional a provision of the Immigration and Nationality Act which authorized either House of Congress, by resolution, to invalidate a decision of the Executive Branch. Specifically, the Court held unconstitutional §244(c)(2) of the Immigration and Nationality Act, which authorized either House of Congress to invalidate a decision of the Executive Branch (pursuant to authority delegated to the Attorney General by Congress) to allow an individual alien—otherwise ripe for deportation—to remain in the United States. The Court reasoned that the "one-House veto" provided by this statutory scheme was legislation, and concluded that, as such, it violated the Presentment Clauses, Art. I, §7, cls. 2, 3, and the bicameral requirement, Art. 1, §1 and §7, cl. 2, of the Constitution.

On August 24, 1983, a Superior Court grand jury returned an indictment charging defendant with rape and carnal knowledge in violation of D.C. Code §22-2801, taking indecent liberties with a minor child in violation of D.C. Code §22-3501(a), and enticing a minor child in violation of D.C. Code §22-3501(b). Defendant was arraigned on September 9, 1983, and is presently scheduled for trial on March 28, 1984.

II

In defendant's motion to dismiss those counts of the indictment charging him with rape and carnal knowledge, he asserts that the statutory provision under which he is being prosecuted, D.C. Code §22-2801, is invalid. He maintains that the relevant legislative veto provision of the Home Rule Act is unconstitutional in light of the Supreme Court's ruling in *Chadha*, because the exercise of such legislative veto power by the House of Representatives in disapproving the Sexual Assault Reform Act of 1981 was unicameral legislation, violative of the presentment clauses and bicameral provision of the Constitution. Defendant further asserts that the legislative veto provisions of the Home Rule Act are severable from the remainder of the Act and that, therefore, the law now in effect is the Sexual Assault Reform Act of 1981. As a result, defendant claims, his post-*Chadha* indictment under D.C. Code §22-2801 cannot stand.

The United States concurs with defendant's assertion that the Home Rule Act's legislative veto provisions are unconstitutional and that they are severable from the Act. However, the United States maintains that *Chadha* should not be applied "retroactively" to invalidate defendant's prosecution. The United States also argues that there should be no prospective application of *Chadha* for a reasonable period of time to allow Congress the opportunity to correct its mistake. In short, it urges the Court to simply wait, in the hope that Congress will somehow—sometime—correct this alleged defect.

The District of Columbia, which was granted leave to intervene in this action, asserts that the legislative veto provisions of the Home Rule Act are constitutional. The District of Columbia maintains that the *Chadha* decision does not apply to the Home Rule Act, because of the unique status of the District. The District of Columbia further maintains that, even if the legislative veto provisions are found to be unconstitutional, then they should be severed from the Act. Moreover, the District of Columbia asserts that even if the veto provision is unconstitutional and severable, then this prosecution should still proceed, since the elements of the offenses are identical under either enactment, allowing this court

(Cont'd. on p. 793 - Veto)

U.S. Court of Appeals for the D.C. Circuit

ADMINISTRATIVE LAW
JUDICIAL REVIEW

Where there is substantial doubt whether agency would adopt same position if challenged portion were subtracted partial affirmance of order is improper.

STATE OF NORTH CAROLINA, ET AL. v. FEDERAL ENERGY REGULATORY COMMISSION, U.S.App.D.C. No. 81-1225, March 20, 1984. *Petition denied* per Antonin Scalia, J. (Harry T. Edwards, J. and David W. Williams, J. (D.C.D. Calif.) concur). *Morton L. Simons* with *Barbara M. Simons* for petitioners. *Joel Cockrell* with *Charles A. Moore* and *Jerome M. Feit* for respondent. *Richard A. Solomon* for intervenor, The Public Service Commission of the State of New York. *Robert C. Richards* for intervenor, Long Island Lighting Company. *James R. Lacey* for intervenor, Public Service Electric and Gas Company. *Joseph P. Stevens, Alvin Adelman* and *M. Margaret Fabic* for The Brooklyn Union Gas Company and *Lewis Carroll* and *Gordon M. Grant for Washington Gas Light Company. Thomas F. Ryan, Jr.* and *Robert G. Hardy* for intervenor, Transcontinental Gas Pipe Line Corporation. *Joseph R. Davison* for intervenor, Philadelphia Gas Works.

SCALIA, J.: The State of North Carolina and the North Carolina Utilities Commission petition under 15 U.S.C. §717r(b) (1982) for review of a Federal Energy Regulatory Commission order determining whether customers of the Transcontinental Gas Pipe Line Corporation are entitled to be paid compensation in conjunction with a series of curtailment plans reducing their allocations of natural gas.

* * *

We find that we cannot grant the relief petitioners have requested—that we reverse the Commission's disposition as to Transco II and III while leaving it in place as to Transco I—because the Commission's order was a unitary one and cannot be severed in that fashion.

Whether an administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent. Where there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted, partial affirmance is improper. *See FPC v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944).

Here the very language used by the Commis-

(Cont'd. on p. 792 - Review)

TABLE OF CASES

We could proceed to examine the merits of the petition—treating it as, what it must be, an attack not merely upon Transco II and III but upon Transco I-III—and, if we find it valid, provide some alternate relief that petitioners have not requested. *See* Fed.R.Civ.P. 54(c). That is appropriate enough where we can be sure of providing the petitioners alternate *relief*—that is, some remedy which does them more good than harm. Here, however, the only relief we can legally grant is a remand permitting petitioners to seek from the Commissioon compensation for Transco II and III, but at the expense of rearguing the compensation already awarded for Transco I. It is, to say the least, not clear that this is to the petitioners' benefit. Not only did they not seek it, but they displayed an evident lack of enthusiasm for it at oral argument.

The situation we confront is analogous to that presented where one party to a contract asks a court to invalidate one portion of an unseverable contract while leaving the remainder in effect. Once the court determines that the challenged provision is unseverable, it ordinarily dismisses the suit, instead of entertaining the possibility of entering an unrequested decree voiding the entire agreement. *See Lummus Co. v. Commonwealth Oil Refining Co.*, 280 F.2d 915, 927-28 (1st Cir. 1960); *Hayutin v. Weintraub*, 207 Cal.App.2d 497, 24 Cal.Rptr. 761, 768-70 (Ct.App. 1962). The same sensible course should be followed where the matter at issue is a request to invalidate an unseverable portion of unitary action on the part of a public agency. In suits to review agency action, as in purely private suits, our function is to provide relief to aggrieved litigants. It does not further that objective to issue an unrequested decree that revivifies as many grievances as it puts to rest.

The matter that is the subject of this petition has remained unresolved for over a decade, and has been back and forth to this court (adopting a conservative method of calculation) six times, and to the Supreme Court once. We are not disposed to undo a resolution viewed as fair by all the parties except one, in a fashion that even that one does not propose and from which it would not clearly benefit. Because the Commission's disposition of Transco I is unseverable from its disposition of Transco II and III, we cannot afford petitioners the relief requested or any other relief that is under the circumstances appropriate.

Petition Denied.

VETO

(Cont'd. from p. 789)

to treat the statutory citation in the indictment as, at most, a formal error in pleading.[1]

The court has considered all of the pleadings submitted by the parties, as well as the oral arguments of the parties, and concludes that the Home Rule Act's unicameral veto provision, applicable solely to local legislation concerning the District of Columbia, does not infringe on any powers of the Executive Department, and is, therefore, well within the plenary powers granted to Congress by Art. I, §8, cl. 17, of the Constitution.

III

Defendant's assertion that the legislative veto provisions of the Home Rule Act are unconstitutional in light of *Chadha* must fail. Defendant's reliance on *Chadha* fails to comprehend that the Supreme Court is analyzing the *federal* scheme of enacting *national* laws, wherein the constitutional design for the separation of powers is of critical importance, whereas the Home Rule Act is rooted in Congress' exclusive and broad powers to legislate on local matters in the District of Columbia pursuant to Art. I, §8, cl. 17, of the Constitution.

The court first looks at defendant's reliance on *Chadha*. The Supreme Court in *Chadha* held that §244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. §1254(c)(2), was unconstitutional. This provision authorized one House of Congress, by resolution, to invalidate a decision of the Executive Branch. The Supreme Court found that the action taken by the House of Representatives in vetoing the Attorney General's determination that a particular alien should remain in the United States was essentially legislative in purpose and effect, because it altered "the legal rights, duties and relations of persons ... outside the legislative branch." *Chadha, id.* at 2784. The Supreme Court reasoned that because the House action was an exercise of legislative power, it was, therefore, subject to the standards prescribed in Article I of the Constitution. By analogy, defendant asserts that §602(c)(2) of the Home Rule Act, which authorizes one House of Congress, by resolution, to invalidate an act passed by the Council and signed by the Mayor, is unconstitutional. Defendant maintains that the disapproval by the House of Representatives of the Sexual Assault Reform Act of 1981 was legislative in purpose and effect, that the disapproval altered his legal rights, duties and relations, and that such an exercise of legislative power was subject to the standards prescribed in Article I. Defendant goes no further in analyzing the applicability of the *Chadha* decision to the Home Rule Act, but this court must.

In *Chadha*, in determining whether §244(c)(2) of the Immigration and Nationality Act violated the strictures of the Constitution, the Supreme Court stated that it was guided by the purposes underlying the Presentment Clauses, Art. I, §7, cls. 2, 3, and the bicameral requirement of Art. I, §1 and §7, cl. 2. The Court observed that "[t]hese provisions of Art. I are integral parts of the constitutional design for the separation of powers." *Id.* at 2781. In discussing the concept of separation of powers the Court explained:

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. *Id.* at 2784.

After discussing at length the Presentment Clauses and bicameralism, the Court summarized how these provisions were essential to the constitutional design for the separation of powers:

> The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the seperation of powers, the carefully defined limits on the power of each branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President. *Id.* at 2787, (footnotes omitted).

The Court admitted that its inquiry into the constitutionality of §244(c)(2) was sharpened by the increasing use of Congressional veto provisions in statutes delegating authority to executive and independent agencies, and the Court stated that the need for the President's participation in the legislative process was, in part, "to protect the Executive Branch from Congress." *Id.* at 2784. Additionally, that Court noted that "the Presentment Clauses serve the important purpose of assuring that a 'national' perspective is grafted on the legislative process:

> 'The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some time, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the legislature whose constituencies are local and not countrywide ...' *Myers* v. *United States, supra*, 272 U.S., at 123." *Id.* at 2782-83.

Clearly, the Court's decision in *Chadha* was based on the purposes underlying the Presentment Clauses and the bicameral requirements of Article I.[2] The Court's rejection of §244(c)(2) was necessitated by the constitutional design for the separation of powers.

Defendant's analogy between §244(c)(2) of the Immigration and Nationality Act and §602(c)(2) of the Home Rule Act is inapposite. While §244(c)(2) was found to constitute an invasion of the Executive Branch by Congress, §602(c)(2) does not run afoul of the constitutional design for the separation of powers. Retained Congressional power over the Executive Branch does have an effect on the Executive Branch, but retained Congressional power over the District of Columbia clearly does not. In enacting §602(c)(2) of the Home Rule Act, Congress was legislating on purely local District of Columbia matters. This court, therefore, concludes that §602(c)(2) does not represent a usurpation by Congress of an Executive function; nor does it offend the constitutional design for the separation of powers; nor does it offend the constitutional mandate for bicameral agreement on national laws.

IV

Defendant's reliance on *Chadha* ignores Congress' unique and broad power over the District of Columbia. Article I, §8, cl. 17 of the Constitution provides that "[t]he Congress shall have power to ... exercise exclusive legislation in all cases whatsoever, over such district ... as may

1. In light of the court's decision on the constitutionality of the legislative veto provision of the Home Rule Act the court need not consider the various positions taken by the parties on severability or on the retroactive or prospective application of *Chadha*.

2. Moreover, the *Chadha* Court found that the bicameralism provision of Art. 1 was particularly important in the context of legislation as a device to protect the interests of the smaller states. Bicameralism, the Great Compromise, resulted in one house being viewed as representing the people, the other house representing the states. *Id.* at 2783-84.

... become the seat of the government of the United States . . . ." That this clause vests Congress with plenary power over the District of Columbia is without dispute. Of Congress' power in this regard the Supreme Court in *Palmore* v. *United States*, 411 U.S. 389, 397-98 (1973), stated:

> Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes . . . . It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, §8.

Similarly, in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 108-109 (1953), that Court stated:

> The power of Congress over the District of Columbia relates not only to "national power" but to "all the powers of legislation which may be exercised by a state in dealing with its affairs." . . . There is no reason why a state, if it so chooses, may not fashion its basic law so as to grant home rule or self-government to its municipal corporations . . . .
>
> This is the theory which underlies the constitutional provisions of some states allowing cities to have home rule. So it is that decision after decision has held that the delegated power of municipalities is as broad as the police power of the state, except as that power may be restricted by terms of the grant or by the state constitution. . . . It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted. (citations omitted) (footnote omitted).

In fact, the Court has repeatedly expressed the view that Congress' power over the District is plenary.[3]

In *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), the Supreme Court held that the Constitution permitted Congress to confer upon Article III courts of the District certain administrative functions that it could not constitutionally confer upon Article III courts elsewhere. The Court reasoned:

> Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts . . . .
>
> If, in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, as it is in dealing with the other federal courts, the administrative and other jurisdiction spoken of could not be conferred upon the former. But the clause giving plenary power of legislation over the District enables Congress to confer such jurisdiction in addition to the federal jurisdiction which the District courts exercise under Art. III, notwithstanding that they are recipients of the judicial power of the United States under, and are constituted in virtue of, that article. *Id.* at 545-46. (citations omitted).

Thus, in exercising its plenary power over the District, Congress is not limited by all of the constitutional restrictions that operate when it is legislating on a national basis. Defendant's assertion that the House's disapproval of the Sexual Assault Reform Act of 1981 was invalid fails to recognize Congress' plenary power over the District. Defendant's rigid interpretation of the Presentment Clauses and the bicameral requirement of Article I, if adopted by this court, would render meaningless the long-established tenet that Congress, in exercising its power over the District, has all the powers of legislation which may be exercised by a state in dealing with its affairs. There is nothing in the Constitution to hinder a state from enacting a statute which contains a unicameral legislative veto provision. Similarly, when exercising its plenary power over the District, there is nothing in the Constitution to hinder Congress from enacting a local statute whih contains such a legislative veto provision.[4]

Recently, the Supreme Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2874 (1982), discussed Congress' plenary authority over the District of Columbia, noting that:

> ". . . the powers granted under [Article I, §8, cl. 17] are obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the executive and judicial powers as well as the legislative." (emphasis in the original).

The appellants in *Northern Pipeline* had urged the Court to extend Congress' power to create Article I courts (see *Palmore* v. *United States, supra*) to permit it to create Article I bankruptcy courts. However, the Court refused to equate Congress' plenary power over the District, pursuant to Article I, §8, cl. 17, to its national power to establish bankruptcy laws pursuant to Article I, §8, cl. 4.[5] The Court held that Congress' authority to create Article I courts, without violating the separation of powers principles of the Constitution, was limited to certain geographical areas, where no state operated as sovereign, and therefore Congress was to exercise the general powers of government. The exceptions, the Court concluded, were the territories, courts martial, and the District of Columbia.[6]

> But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Article III courts. Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. *Id.* at 2867-68.

In the instant case, as in *Northern Pipeline*, the literal commands of Constitutional provisions "must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole." *Id.* Thus, in *Northern Pipeline*, the Court clearly recognized that Congress' powers under Art. 1, §8, cl. 17 are different in kind from its other Art. 1, §8 powers and that Congress' exercise of those unique powers is not limited by all of the constitutional restrictions that operate when it is legislating on a national basis.

V

Indeed, an examination of an exceedingly relevant historical context buttresses this court's conclusion that Congress' utilization of a unicameral veto power over local laws promulgated by the District of Columbia's council and mayor does no violence to the Constitution. That historical context is the very first Congress' dealings with the Northwest Territories. That first Congress reenacted the Northwest Territories Ordinance of 1787, once the Constitution was enacted, to conform to the requirements of that document. One of the provisions of the ordinance provided that a majority of a territory's judges and its governor should enact laws and report them to Congress, and that these laws should be in force in the territory unless disapproved by Congress. There was no provision in the ordinance for presentment to the President. Although the First Congress did change various provisions of the ordinance, to conform to the Constitution, they made no change in this provision regarding a Legislative veto over territorial laws. See *Chadha, supra*, at 2800-01, fn. 18 (dissent of Mr. Justice White).

This historical context is relevant for two reasons. First, Congress' power over the District of Columbia pursuant to Art. I, §8, cl. 17, is most nearly analogous to its power over the territories pursuant to Art. IV, §3, cl. 2. Indeed, the Supreme Court has found the analogy to be quite apt, noting that "the power of Congress over the District and its power over the Territories are phrased in very similar language in the Constitution." *District of Columbia* v. *Thompson Co., supra*, 105-106.

Second, the actions of the first Congress are of particular significance in interpreting the Constitution since that Congress was largely composed of the persons who had written Article I and secured the ratification of the Constitution:

> "In the first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixed the construction to be given its provisions." *Hampton* v. *United States* 276 U.S. 394, 412 (1928).

The first Congress is one "whose Constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926). The actions of that first Congress, then, in providing a Legislative veto for proposed territorial laws, very strongly indicates that the similar Legislative veto over proposed District of Columbia laws in the Home Rule Act does no violence to the provisions of the Constitution.

VI

The Presentment Clauses and the bicameral

3. *O'Donoghue* v. *United States*, 289 U.S. 516, 545 (1933); *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435 (1932); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 5 (1899); *Shoemaker* v. *United States*, 147 U.S. 282, 300 (1893); *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407 (1886); *Mattingly* v. *District of Columbia*, 97 U.S. 678, 690 (1878); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 619 (1838).

4. Congress is, of course, prohibited from dispensing with any of the guarantees of personal liberty in the amendments and in the original Constitution when exercising its plenary power over the District.

5. It is interesting to note that Congress' power to establish bankrupcty laws and Congress' power to establish a uniform rule of naturalization both flow from Article I, §8, cl. 4. In *Northern Pipeline* and in *Chadha*, the Supreme Court found that Congress' broad exercise of national power under clause 4 violated strictures of the Constitution.

6. The Court included one more exception: legislative courts and administrative agencies created to adjudicate cases involving "public rights."

requirement of Article I must be complied with when national legislation is enacted. *Chadha* makes that conclusion abundantly clear. However, Congress, in exercising its plenary powers over the District of Columbia, may eschew these requirements, since both Congress and the Supreme Court have recognized that provisions of the Constitution:

"... which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States, supra,* 407-408.

VII

Accordingly, defendant's Motion to Dismiss Counts of the Indictment must be denied.

SO ORDERED.

LEGAL NOTICES

FIRST INSERTION

ANDERSON, Mammie D. Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 699-84
Mammie D. Anderson, deceased
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

Amos Donaldson, 5517 C Street, S.E., John Donaldson, 1406 Quincy Street, N.W., Rachel Berry, 5517 C Street, S.E., Washington, D.C., were appointed Personal Representatives of the estate of Mammie D. Anderson, who died on February 24, 1982 without a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before Oct. 20, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before Oct. 20, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its first publication shall so inform the Register of Wills, including name, address and relationship. RACHEL BERRY; AMOS S. DONALDSON; JOHN DONALDSON. First Published: Apr. 20, 1984. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] Apr. 20, 25, May 2.

CHATELAIN, Elma Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 584-84
Elma Chatelain, deceased
Roger F. Smith, *Attorney*
1726 M St., N.W., Wash., D.C. 20036
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

NS&T Bank, N.A., whose address is 15th Street & New York Avenue, N.W., Washington, D.C. 20005, was appointed Personal Representative of the estate of Elma Chatelain, who died on February 8, 1984 with a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment (or to the probate of decedent's Will) shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before Oct. 20, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before Oct. 20, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its first publication shall so inform the Register of Wills, including name, address and relationship. DIANE STOKES SOCKWELL, Trust Account Administrator for NS&T BANK, N.A. First Published: Apr. 20, 1984. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] Apr. 20, 25, May 2.

COOK, Ida E. Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 428-84
Ida E. Cook a/k/a Ida W. Manning, deceased
John C. Smuck, *Attorney*
Cross, Murphy, Bills & Smuck
1625 Eye Street, N.W., #622
Washington, D.C. 20006
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

Effie E. Wideman, whose address is 1322 Shepard Street, N.W., Washington, D.C. 20011, was appointed Special Administrator of the estate of Ida E. Cook a/k/a Ida W. Manning, who died on June 7, 1983 with a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment (or to the probate of decedent's Will) shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before Oct. 20, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before Oct. 20, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its first publication shall so inform the Register of Wills, including name, address and relationship. EFFIE E. WIDEMAN. First Published: Apr. 20, 1984. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] Apr. 20, 25, May 2.

EDMONDS, Willie Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 750-84 S.E.
Willie Edmonds, deceased
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

Hascal R. Kearney, whose address is 4716 Pard Road, Capitol Heights, Maryland 20743, was appointed Personal Representative of the estate of Willie Edmonds, who died on November 14, 1983 without a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before May 21, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before May 21, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its publication shall so inform the Register of Wills, including name, address and relationship. HASCAL R. KEARNEY. Name of Newspaper: Washington Law Reporter. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] Apr. 20.

FISCHER, Jacob, Jr. Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 752-84 S.E.
Jacob Fischer, Jr., deceased
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

George J. Rabil, whose address is 5321 Truman Ave., Alexandria, Va. 22304, was appointed Personal Representative of the estate of Jacob Fischer, Jr., who died on February 24, 1984 without a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before May 21, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before May 21, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its publication shall so inform the Register of Wills, including name, address and relationship. GEORGE J. RABIL. Name of Newspaper: Washington Law Reporter. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] Apr. 20.

GIBBON, Joan O. Deceased

Superior Court of the District of Columbia
Probate Division
Foreign No. 76-84
Joan O. Gibbon, Deceased
Notice of Appointment of Foreign Personal
Representative and Notice to Creditors

Bruce N. Goldberg, whose address is 4720 Montgomery Lane, Suite 1000, Bethesda, Maryland 20814, was appointed Personal Representative of the estate of Joan O. Gibbon, deceased, on March 3, 1983, by the Orphan's Court for Montgomery County, State of Maryland. Service of process may be made upon Ann Harding, 2400 Virginia Avenue, Suite C1008, Washington, D.C. 20037, whose designation as District of Columbia agent has been filed with the Register of Wills, D.C. The decedent owned the following District of Columbia real property: 1/8 interest in Dorchester House Condominium, Square 2572, Lots 2001 through 2404 otherwise known as 2480 16th Street, N.W., Washington, D.C. 20009. Claims against the decedent may be presented to the undersigned and filed with the Register of Wills for the District of Columbia, 500 Indiana Avenue, N.W., Washington, D.C. 20001 within six months from the date of first publication of this notice. BRUCE N. GOLDBERG. Date of first publication: Apr. 20, 1984. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] Apr. 20, 25, May 2.

HORNADAY, Bernice M. Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 690-84
Bernice M. Hornaday, deceased
Richard J. Abbondanza, *Attorney*
10605 Concord Street, Suite 303
Kensington, MD 20895
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

Linda H. Cina, whose address is 14421 Innsbruck Court, Wheaton, MD 20906, was appointed Personal Representative of the estate of Bernice M. Hornaday, who died on February 27, 1984 without a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before Oct. 20, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before Oct. 20, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its first publication shall so inform the Register of Wills, including name, address and relationship. LINDA H. CINA. First Published: Apr. 20, 1984. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] Apr. 20, 25, May 2.

MURRAY, Clarence Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 394-83
Clarence Murray, deceased
Alan H. Freedman, *Attorney*
1430 K Street, N.W., Suite 500
Washington, D.C. 20005
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

Elise V. Murray, whose address is 5118 Kansas Avenue, N.W., Washington, D.C. 20011, was appointed Personal Representative of the estate of Clarence Murray, who died on January 19, 1982 with a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment (or to the probate of decedent's Will) shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before Oct. 20. 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before Oct. 20, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a

THE WHITE HOUSE

WASHINGTON

April 23, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Statement of Tom Healey Concerning S. 1858/H.R. 3932, D.C. Chadha on Wednesday, April 25, 1984

OMB has asked for our views by 4:00 p.m. today on testimony Assistant Secretary of the Treasury Tom Healey would like to deliver on Wednesday before the Senate Subcommittee on Governmental Efficiency and the District of Columbia concerning the D.C. Chadha problem. Treasury is interested in the D.C. Chadha problem because until it is resolved the District cannot enter the bond market and must instead borrow funds for certain requirements from the Treasury. The District cannot enter the bond market because it cannot obtain an unqualified bond counsel opinion with the Chadha cloud over the District's legal authority.

Both Justice and OMB are opposed to Treasury testifying at all. The D.C. Chadha issue is most advantageously posed for us in terms of the criminal justice implications; the bond authority issue obfuscates matters and, as far as Treasury is concerned, it is more important that the issue be resolved than that it be resolved in any particular manner. In short, Treasury does not share our interests in this matter, and in stressing the need for expeditious resolution may actually harm the Administration position, since the most expeditious way to resolve the crisis would be for the Senate to pass the District's bill, which has already passed the House. I recommend that we concur with the Justice and OMB view that Treasury not testify.

There are also several errors in the substance of the proposed testimony, which we should highlight in the event Treasury does testify. In the first full paragraph on page 3 Healey asserts that the Court's opinion in Chadha contained "a general statement that unconstitutional veto provisions are severable from the remainder of the affected acts," and that the opinion "does not include the Home Rule Act among those Federal statutes identified as affected." Both statements are misleading. The opinion does not contain a general statement that unconstitutional veto provisions are severable; it simply states the test that invalid portions of a statute are to be severed unless the

Legislature would not have enacted the statute without the invalid provision. See slip op., at 10. Further, the Chief Justice's opinion does not contain a list of statutes affected by the ruling, so the fact that the Home Rule Act does not appear in such a list is meaningless. The paragraph is an obvious effort to suggest that the Home Rule Act is unaffected by Chadha, even though the Justice Department has determined that it is and has so argued in court. The paragraph, other than the first sentence, should be deleted.

The second paragraph on page 4, and the carryover paragraph between pages 4 and 5, suggest that the matter could be resolved by adding a severability clause to the Home Rule Act. The last sentence on page 4 further suggests that the Justice opposition to the pending District bill is based on elements "other than the severability provision." While this is true with respect to the Justice letter of November 15, 1983, the severability issue was not specifically raised or addressed at that time. In its later letter sent March 12, 1984, specifically addressed to the proposal to add a severability clause to the Home Rule Act, Justice noted the Administration's firm opposition to this approach. (Adding a severability clause would, in effect, give the District everything it is asking for, since the severability clause would result in the legislative vetoes being stricken, with nothing in their place. End result: Congress must pass a joint resolution of disapproval to block District actions.) Both the first full paragraph on page 4 and the carryover paragraph between pages 4 and 5 should be deleted.

The attached draft memorandum for OMB agrees with Justice and OMB that Treasury should not testify, and recommends the above changes should that view not prevail.

Attachment

cc: Richard A. Hauser

THE WHITE HOUSE

WASHINGTON

April 23, 1984

MEMORANDUM FOR JANET M. FOX
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Tom Healey Concerning S. 1858/H.R. 3932, D.C. Chadha on Wednesday, April 25, 1984

Counsel's Office has reviewed the above-referenced proposed testimony. I agree with the recommendation of OMB and the Department of Justice that Treasury not appear at the hearing. Treasury's interest is simply that the D.C. Chadha problem be resolved as expeditiously as possible; Treasury has no real institutional interest in how the problem is resolved. That, however, is precisely the issue that has been joined, and it seems best to limit Administration testing on this issue to those agencies affected by the answer to that question.

If the proposed Treasury testimony is to be delivered, several corrections will have to be made. All but the first sentence of the first full paragraph on page 3 should be deleted. The second sentence is inaccurate: the Court's opinion does not contain a general statement that unconstitutional veto provisions are severable. Rather, the opinion states the pertinent test, which is that unconstitutional provisions are severable unless the Legislature would not have enacted the statute without the invalid provisions. This hardly constitutes a general statement that veto provisions are severable. The third sentence, stating that the Home Rule Act was not among the Federal statutes cited as affected by the Court's opinion, is very misleading, since the opinion contained no such comprehensive list of affected statutes.

We also recommend deleting the first full paragraph on page 4, and the carryover paragraph between pages 4 and 5. These paragraphs suggest that the problem could be resolved by adding a severability clause to the Home Rule Act, and the fourth sentence of the carryover paragraph notes that the Justice letter of November 15, 1983, opposed H.R. 3932 on grounds "other than the severability provision." Justice's letter of March 12, 1984, however, specifically opposed the severability approach.

FFF:JGR:aea 4/23/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

April 23, 1984

MEMORANDUM FOR JANET M. FOX
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Tom Healey Concerning S. 1858/H.R. 3932, D.C. Chadha on Wednesday, April 25, 1984

Counsel's Office has reviewed the above-referenced proposed testimony. I agree with the recommendation of OMB and the Department of Justice that Treasury not appear at the hearing. Treasury's interest is simply that the D.C. Chadha problem be resolved as expeditiously as possible; Treasury has no real institutional interest in how the problem is resolved. That, however, is precisely the issue that has been joined, and it seems best to limit Administration testing on this issue to those agencies affected by the answer to that question.

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FFF:JGR:aea 4/23/84
cc: FFFielding/JGRoberts/Subj/Chron

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO			
	Anna Dixon	Take necessary action	☐
	John Cooney	Approval or signature	☐
✓	John Roberts	Comment	☐
	Connie Horner	Prepare reply	☐
	Mike Horowitz	Discuss with me	☐
		For your information	☐
		See remarks below	☐
FROM	Jan Fox	DATE	4/20/84

REMARKS

Attached for review is draft Treasury testimony for Wednesday on S. 1858/H.R. 3932, D.C. Chadha.

As you can see from the attached JTP memo, staff has recommended that Treasury not appear at the hearing. No decision has yet been made on Treasury's appearance.

Please get me your comments by 4:00 P.M. Monday, 4/23. If I don't hear from you by then, I will assume you have no objections.

Attachment

OMB FORM 4
Rev Aug 70

FOR RELEASE ON DELIVERY
EXPECTED AT 9:30 A.M.
Wednesday, April 25, 1984

STATEMENT OF THOMAS J. HEALEY
ASSISTANT SECRETARY (DOMESTIC FINANCE)
U.S. DEPARTMENT OF THE TREASURY
BEFORE THE
SENATE SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA

Senator Mathias, it is a pleasure to be here to discuss the financing situation of the District of Columbia vis a vis the Federal government in light of the decision of the Supreme Court in Immigration and Naturalization Service v. Chadha in June 1983. The decision has had significant consequences for the financial situation of the District. In this statement, I would like to discuss the District's current financial relationship with the Treasury Department, the effects of Chadha on the District's prospects for borrowing in the market, and the situation that will be likely to prevail until the Chadha issue is resolved.

Background

Treasury's interest in this matter lies in the obstacle Chadha has placed in the way of the District's efforts to do all of its financing in the market, thereby ending its financing dependence on the Treasury.

The District's authority to borrow short-term from the Treasury is based on 53 Stat. 1118 (47 D.C. Code 3401). This authority has no expiration date. In fiscal year 1983, the District borrowed a total of $150 million from the Treasury under this authority. These advances were repaid on September 30, 1983.

The District's current authority to borrow long-term from the Treasury for capital purposes is based on Title IV of the Omnibus Budget Reconciliation Act of 1981. The District pays interest on this borrowing at Treasury's long-term rates, which are significantly higher than the tax-exempt rate at which the District would be eligible to borrow directly in the market. The authorization for long-term borrowing by the District from the Treasury expires on September 30, 1984. No new authority has been requested.

The District borrowed $145 million from Treasury in fiscal year 1983 under the long-term authority. The authorization for FY 1984 is $145 million, but only $115 million has been appropriated (P.L. 98-125, signed October 13, 1983). None of this has yet been drawn upon by the District.

The District's FY 1984 budget provides for $150 million of new capital outlays. The lower appropriation reflects agreement between the Administration and the District in the development of the FY 1984 budget request that the District would do at least $45 million of long-term financing in the market this year. No authorization for borrowings in future years was requested in the FY 1985 budget on the assumption that the District will be able to meet all its long-term financing needs in the marketplace beginning next year. This assumption is invalid until the Chadha issue is resolved.

Since 1974, the Home Rule Act has authorized the District to meet its short- and long-term credit requirements in the market. For several years after home rule, a number of serious financial problems well known to this subcommittee forced the District to

continue its traditional reliance on Treasury for financing. By this time a year ago, however, the District's excellent progress in resolving these problems--including several years of balanced operating budgets under generally accepted accounting principles--made a serious effort to enter the market a practicable option. The District had engaged bond counsel, financial advisors, and underwriters. Preparations were under way for a public offering of revenue anticipation notes (RAN's) to meet the City's short-term financing requirements in fiscal year 1984. Plans were also being developed for the District's first long-term issuance in the bond market at some point during FY 1984.

Then, in June 1983, the Supreme Court issued its decision in the Chadha case. The Court's opinion includes a general statement that unconstitutional veto provisions are severable from the remainder of the affected acts, which remain in force. Moreover, the opinion does not include the Home Rule Act among those Federal statutes identified as affected. Justice White's dissenting opinion, however, cites the District of Columbia Home Rule Act as potentially affected.

After analysis of the Supreme Court's decision, the District's bond counsel concluded that,

> Although we are of the opinion that the Congressional veto provisions of the Home Rule Act would be held to be severable from the remaining provisions of the Home Rule Act in a properly presented case, the matter is not free from doubt and a court could hold the Home Rule Act invalid, in whole or in part. Such a holding could also invalidate the Act, the Notes and the Escrow Agreement and other governmental actions taken pursuant to the Home Rule Act. (Emphasis added.)

Counsel further indicated that it would be unable to render an unqualified opinion on the authority of the City to issue debt obligations until the applicability of Chadha to the District is resolved by the courts or the Congress. This effectively means that the District will be unable to issue its obligations in the market until the Chadha issue is resolved.

[It is our understanding that the view of the District's bond counsel is that resolution of the Chadha issue will require either a ruling of the Supreme Court specifically affirming the applicability of its observations on severability to the Home Rule Act or the enactment of legislation by the Congress that would add a a standard severability clause to that Act.]

NOT AN OPTION FOR US

I understand that the District has been advised by its bond counsel that the recent Superior Court rulings, which hold--in essence--that the Chadha decision does not affect the Home Rule Act, do not resolve the issue. Bond counsel remains unwilling to issue an unqualified opinion on the ground that the next challenge to the Home Rule Act based on Chadha cannot be presumed to be decided by the courts in the District's favor.

A standard severability provision appears in H.R. 3932 and S. 1858. The District has supported the enactment of both bills. H.R. 3932 passed the House on October 4, 1983. S. 1858 is before this Committee. As you know, the Justice Department indicated its opposition to an element of H.R. 3932 (and, therefore, S. 1858) other than the severability provision in a letter from Assistant Attorney General McConnell to Senator Roth on November 15, 1983.

NO! (JUSTICE LETTER OPPOSES SEVERABILITY APPROACH)

The witness from the Justice Department has addressed this issue directly. I have no comments on that matter.

Developments Since Chadha

On December 6, 1983, Mayor Barry wrote to Secretary Regan requesting advances totalling $150 million in FY 1984. The Mayor indicated that the advances would be necessary because the District would be unable to implement its plans to sell RAN's in the market as long as the Chadha problem remained unresolved.

Treasury advised District officials that, before Treasury could consider further advances to the District, it would be necessary for us to be satisfied that the District would be unable to obtain the financing from other sources on reasonable terms. The District was asked to provide documentation of its efforts to identify private sources of financing and the evaluations of the District's financial advisors and senior bond counsel of the prospects for success in arranging bank financing.

The District provided Treasury with the requested documentation on December 22. The response included letters from bond counsel, the City's financial advisors and underwriters, and three commercial banks. The letters suggested that the District had reasonable prospects of securing seasonal financing in the market if an arrangement could be concluded that would insulate the lender from the risk of an invalidity determination growing out of the Chadha decision.

In light of this information, Treasury agreed to enter into discussions with the District the objective of which would be to

develop such an arrangement. The ultimate result of these discussions was an exchange of letters between the Secretary and the Mayor establishing an agreement that would protect the lender against the risk of an invalidity determination based on Chadha. Specifically, Treasury agreed to exercise its authority to advance, on behalf of the District, directly to the commercial bank selected by the District for the private placement of the RAN's--such amount as might be necessary to liquidate the institution's loan to the District in the event that a court ruling growing out of Chadha were to preclude the District from meeting its commitments under the terms of the notes.

With this arrangement in place, $150 million of District RAN's, carrying a tax-exempt interest rate of 6.6 percent and repayable on September 27, 1984, was privately placed on January 27, 1984. This arrangement was clearly understood by all parties not to constitute a Federal guarantee of the District note issue. The Bank assumed the full credit risks associated with the transaction. I would add only that this arrangement was regarded by both parties as a one-time expedient, entered into as a bridge to carry the District across the period of uncertainty until the Congress would dispell the Chadha cloud once and for all.

Conclusion

The District will be unable to borrow in the market until the Chadha issue is settled. As long as the issue remains unresolved, an adverse court ruling that would impair the validity of a debt issuance remains a remote but real prospect.

It is Treasury's view that, as soon as the Chadha issue is resolved, the District will have no trouble meeting its credit requirements in the market. The District's basic fiscal health is sound, and its borrowing prospects are bright.

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